Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 116.

HENRY BIGELOW WILLIAMS and CHARLES F. AYER,

PLAINTIFFS IN ERROR,

v.

HOSEA M. KNOWLTON,

DEFENDANT IN ERROR.

In Error to the Supreme Judicial Court of Massachusetts.

Brief for the Plaintiffs in Error.

Statement of the Case.

This writ of error is brought to reverse a decree of the Supreme Judicial Court of Massachusetts, upon an information in equity in the name of the attorney general, originally at the relation of the Museum of Fine Arts in Boston, requiring the cutting down and removal of the upper part of the building in Boston known as the Westminster Chambers, belonging to the defendants below, now the plaintiffs in error, on the ground that it encroaches upon a public easement limiting its height.

The decree is deemed erroneous, as amounting to a deprivation of the plaintiffs in error of their property without due process of law, in violation of the Fourteenth Amendment; in that the provision for compensation or damages in the statute of eminent domain upon which it is based is of doubtful validity and insufficient to warrant such a decree in advance of a conclusive determination that it is valid and enforceable; which question is yet undetermined and cannot be determined in this proceeding.

The single question in the case is, substantially, whether it is consistent with due process of law for a court to decree the actual destruction of property under a statute of eminent domain by which the state takes certain rights in it, making provision for compensation only by giving the owners a right of action against a city for their damages, while the city, which had no part in the taking, denies the validity of the provision for compensation, upon which the validity of the taking depends, and refuses to pay any damages unless and until it is held liable therefor in another proceeding, which is yet undetermined.

The statute upon which the case arises is, in some particulars, without precedent in Massachusetts legislation or probably elsewhere. As essential to a clear understanding of the statement, it is introduced at this point: —

MASSACHUSETTS STATUTE OF 1898, CHAPTER 452.

AN ACT RELATIVE TO THE HEIGHT OF BUILDINGS ON AND NEAR COPLEY SQUARE IN THE CITY OF BOSTON.

Be it enacted, etc., as follows:

SECTION 1. Any building now being built or hereafter to be built, rebuilt or altered in the city of Boston, upon any land abutting on St. James avenue, between Clarendon street and Dartmouth street, or upon land at the corner of Dartmouth street and Huntington avenue, now occupied

by the Pierce building, so-called, or upon land abutting on Dartmouth street, now occupied by the Boston Public Library building, or upon land at the corner of Dartmouth street and Boylston street, now occupied by the New Old South Church building, may be completed, built, rebuilt or altered to the height of ninety feet, and no more; and upon any land or lands abutting on Boylston street, between Dartmouth street and Clarendon street, may be completed, built, rebuilt or altered to the height of one hundred feet, and no more: *provided, however*, that there may be erected on any such building, above the limits hereinbefore prescribed, such steeples, towers, domes, sculptured ornaments and chimneys as the board of park commissioners of said city may approve.

SECTION 2. The provisions of chapter three hundred and thirteen of the acts of the year eighteen hundred and ninety-six, and of chapter three hundred and seventy-nine of the acts of the year eighteen hundred and ninety-seven, so far as they limit the height of buildings, shall not be construed to apply to the territory specified and restricted in section one of this act.

SECTION 3. The owner of or any person having an interest in any building upon any land described in section one of this act, the construction whereof was begun but not completed before the fourteenth day of January in the current year, who suffers damage under the provisions of this act by reason or in consequence of having planned and begun such construction, or made contracts therefor, for a height exceeding that limited by section one of this act for the locality where said construction has been begun, may recover damages from the city of Boston for material bought or actually contracted for, and the use of which is prevented by the provisions of this act, for the excess of cost of material bought or actually contracted for over that which would be necessary for such building if not exceeding in height the limit prescribed for that locality by section one of this act, less the value of such materials as are not required on account of the limitations resulting from the provisions of this act, and the actual cost or expense of any re-arrangement of the design or construction of such building made necessary by this act, by proceedings begun within two years of the passage of this act, and in

the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city.

SECTION 4. Any person sustaining damage or loss in his property by reason of the limit of the height of buildings provided for in this act, may recover such damage or loss from the city of Boston, by proceedings begun within three years of the passage of this act, and in the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city.

SECTION 5. This act shall take effect upon its passage. [*Approved May 23, 1898.*

This statute is held by the Massachusetts court to be an exercise of the power of eminent domain, for the improvement of the light, air, and view of the public square or park on which the building stands, and to amount to a taking, for this purpose, of property rights, in the nature of an easement, in the estate of the plaintiffs in error. (Record, pp. 55, 57, 58, 60.)

The features of the statute to which special attention is called are (1) that it purports to take rights in certain specific parcels of land, in the nature of an easement limiting the height of buildings thereon; (2) that the taking is directly made by the legislative act; (3) while the only provision for compensation or damages is that the owners may recover damages against the city of Boston therefor. The taking is directly by the state, while the damages are cast upon the city.

The building stands upon land "abutting on St. James avenue between Clarendon street and Dartmouth street," as described in section 1 of the statute; the provision applied to that land being that any building upon it "may be completed, built, rebuilt or altered to the height of ninety feet and no more . . . provided, however, that there may be erected on any

such building, above the limits hereinbefore prescribed, such steeples, towers, domes, sculptured ornaments and chimneys as the board of park commissioners of said city may approve."

The building is for residential apartments, and was originally designed to be of the height of 120 feet (which was then lawful) and to consist of ten stories, with an ornamental architrave, frieze, and cornice, about six feet in height, above the tenth story. (Agreed Facts, Record, p. 28.) At the time of the passage of the statute, May 23, 1898, the building was in process of erection, and about half completed. (Agreed Facts, Record, p. 29.)

The statute restricted the building to eight stories, the height of which is about 90 feet, instead of ten stories, of the height of 120 feet, as originally designed. Upon its passage the owners conferred with the city authorities, and various methods of completing the building in conformity to the statute were considered. "It was the opinion of the mayor and law officers of the city and of the defendants' counsel that, in any view of the statute, the building could be lawfully completed at the height of eight stories, with the architrave, frieze and cornice of sculptured ornaments thereon, as originally designed, if such ornaments were approved by the park commissioners, under the authority conferred by the statute." The owners were given to understand that they would be so approved. Accordingly, the exterior walls of the building were carried up to the height of about six feet above the eighth story, enclosing an air-space, and the architrave, frieze, and cornice of sculptured ornaments were imposed upon and tied into the face of the upper six feet of the walls upon the two street fronts of the building, of which they form a part. The extreme height of the building as completed, including this ornamental superstructure, is 96 feet. (Agreed Facts, Record, pp. 31, 32.)

This was done in good faith, all parties concerned believing that such construction, with the approval of the park commissioners, was permitted by the statute. "It was the opinion and belief of the city law officers, the mayor, the defendants' counsel and the defendants, that such approval would make the structure lawful, in any view of the statute." (Agreed Facts, Record, p. 31.)

Thereupon the park commissioners voted their approval of the ornamental superstructure, in the form shown in the record. (Agreed Facts, Record, pp. 31, 32.)

September 17, 1898, when the building was substantially completed, this information was brought, seeking to enjoin the maintenance of that part of the building above the ninety feet line, which alone is in question. The defendants filed a demurrer, plea, and answer; the demurrer and answer setting up, with other defences not now material, that "the statute . . . in its application to the defendants, . . . is in violation of the second clause of section 1 of the 14th Amendment and of other provisions of the constitution of the United States." (Record, pp. 7, 11, 16, 19, 25, 26.)

The case was reserved by the presiding justice for the full court. October 30, 1899, the court, by a majority decision, overruled the demurrer and pleas, holding the statute constitutional. (Record, pp. 13, 54–60.)

Pending this proceeding, the defendants therein, to save the statutory limitation of time, brought petitions against the city of Boston, under sections 3 and 4 of the statute of 1898, for the damages to their building and estate which the statute purports to provide. The city filed a general denial by way of answer. The city officials who control its action on the subject deny any liability to the petitioners, the plaintiffs in error; deny that the statute imposes any

valid obligation upon the city to pay damages; deny the power of the legislature to require the city to pay damages in such a case; and refuse to pay any damages unless and until it is finally and conclusively determined in that proceeding that the city is liable therefor. These petitions are still awaiting trial. (Agreed Facts, Record, p. 44.)

January 30, 1900, the defendants below brought this attitude of the city to the attention of the court, and moved that the present proceeding be continued to await determination of the validity of the statutory provision for damages. The court took no action upon this motion. (Record, p. 14.)

October 2, 1900, the defendants below amended their answer, setting up the refusal of the city to pay damages; its lack of any moneys, or power to raise or appropriate moneys, for the purpose; alleging that the city should be joined as a party to the information, in order that the validity of the statutory provision for damages may be determined in this proceeding, and reasserting that "the statute of 1898, in its application to the defendants, is in violation of . . . the second clause of section 1 of the 14th Amendment and other provisions of the constitution of the United States." (Record, pp. 15, 16.)

At the same time the defendants moved that the informant be required to join the city as a party defendant, in order that the question of the city's liability to damages might be conclusively determined in this proceeding, or, in default of such joinder, that the prosecution be stayed until the city's liability to damages could be conclusively determined in the other proceeding against it. This motion was denied, and the defendants appealed from the denial thereof. (Record, p. 17.)

November 7, 1900, the defendants *moved that the* case be sent to a master, to ascertain what alterations in the building were necessary to make it conform to

the opinion of the court rendered on the demurrer and plea, with a view to make such alterations and avoid farther litigation. This motion was denied, and the defendants appealed. (Record, p. 18.)

December 13, 1900, the defendants further amended their answer, reasserting therein that "the statute . . . in its application to the defendants . . . is in violation of the second clause of section 1 of the Fourteenth Amendment and other provisions of the constitution of the United States." (Record, pp. 19, 25, 26.)

At the same time an agreed statement of facts was filed by the parties (Record, pp. 27–49), and the case was thereafter reserved by the presiding justice, upon the pleadings, the defendants' motion to have the city of Boston made a party, the appeal from the overruling thereof, and the agreed facts, for the consideration of the full court. (Record, p. 50.)

March 13, 1901, the full court rendered an opinion re-affirming the constitutionality of the statute, and overruling all other defences (Record, pp. 61, 62), and entered a final decree, in the form exhibited in the record, pp. 50, 51.

The decree enjoins and restrains the defendants "from *maintaining* the building mentioned in the information and known as Westminster Chambers, *after the first day of October next, above the height of ninety feet*, and from hereafter constructing or erecting it above that height, and from maintaining it above that height if newly constructed; without prejudice, however, to their right under the statute to maintain or erect and maintain on said building above the height of ninety feet such steeples, towers, domes, sculptured ornaments, and chimneys as the board of park commissioners of the city of Boston may hereafter approve; *and the said Williams and Ayer, trustees, are commanded and directed on or before the first day of October next to take down and*

remove those parts of the walls of said building which are above the height of ninety feet, and such other parts of said building as are above that height; this is without prejudice however to their right under the statute to erect and maintain such steeples, towers, domes, sculptured ornaments, and chimneys as the board of park commissioners of the city of Boston may *hereafter* approve." (Record, pp. 50, 51.)

The execution of the decree was stayed by this writ of error, and awaits the decision of this court thereon.

Specification of Errors Relied On.

The plaintiffs in error rely on the first error assigned, namely: —

1. The court erred in enjoining and restraining the defendants from maintaining the building mentioned in the information and known as the Westminster Chambers, after the first day of October next, above the height of ninety feet, and from hereafter constructing or erecting it above that height; and in commanding and directing the defendants, on or before the first day of October next, to take down and remove those parts of the walls of said building which are above the height of ninety feet, and such other parts of said building as are above that height (Record, p. 52.)

The decree is erroneous, in this:

It is not consistent with due process of law, in the sense of the Fourteenth Amendment, for a state court to decree the actual cutting down of a building under a statute of eminent domain by which the state assumes *to have taken* a right, in the nature of an easement in the estate, to limit its height, making

provision for compensation to the owners only by giving them a right of action for damages against the city in which the building stands, while the city, which is not a party to the proceedings or decree and therefore is not bound thereby, and which had no part in the taking and therefore is not estopped to dispute its validity or its own liability to damages, denies the constitutionality of the statute, the validity of the taking, and the validity of the requirement that it shall pay damages, and refuses to pay any damages unless and until it is held liable therefor in another proceeding, which question remains undetermined at the time of the decree, and cannot be finally determined in this proceeding, as the city is not party to it, nor by the state court in any other proceeding, in view of the legal right of the city to bring it before this court for final determination.

As such a decree at this stage may result in the destruction and loss of the property without the compensation to the owner which is essential to due process of law in the exercise of eminent domain, it fails to satisfy the requirements of the due process clause of the Fourteenth Amendment.

For the purpose of reversing the present decree the plaintiffs in error rely also on the assignments of error numbered 2 to 6, inclusive, as follows: —

> "2. The court erred in ruling and holding that said Massachusetts statute of 1898, chapter 452, is not in conflict with the clause of the 14th Amendment of the Constitution of the United States forbidding any state to deprive any person of property without due process of law.
>
> "3. The court erred in ruling and holding that said statute does not deprive the defendants of their property without due process of law, in violation of the 14th Amendment of the Constitution of the United States.

"4. The court erred in ruling and holding that said statute makes due provision for just compensation for the property of the defendants thereby taken, as required by due process of law under the 14th Amendment aforesaid.

"5. The court erred in ruling and holding that no provision for an award of damages to the defendants for their property taken by said statute without an action brought by the defendants therefor, is essential to due process of law under the 14th Amendment aforesaid.

"6. The court erred in ruling and holding that the requirement of said statute that the city of Boston shall pay damages to the defendants for their property thereby taken is sufficient provision for just compensation to the defendants, as required by due process of law under the 14th Amendment aforesaid." (Record, p. 53.)

As to these assignments of error:

The particular thing now complained of is that the decree requires the actual cutting down of the building *while it is yet uncertain whether the statute makes any valid and enforceable provision for compensation or damages, or, therefore, whether it has lawfully effected a taking of any rights in the estate.*

The ultimate question whether the statute is constitutional in its application to the city of Boston, that is, whether the legislature has power to take this property for this purpose and require the city to pay the damages, cannot be finally determined in this proceeding, to which the city is not a party.

The question now presented is whether it is consistent with the Federal requirement of due process of law for a state legislature to authorize, or a state court to decree, the enforcement of a statute of emi-

nent domain by actual dispossession and destruction of property, while the third party, on whom alone the statute cast the damages, disputes, and has a right to dispute, its liability to damages, on which the validity of the taking depends, and refuses to pay unless and until held liable in another proceeding yet undetermined.

In other words, the case does not present for final determination the question whether the statute is constitutional in its application to the city. It presents only the question whether it is so far constitutional in its application to the plaintiffs in error as to warrant this decree against them at this time and under these circumstances.

Brief of the Argument.

Preliminary Points.

The case comes to this court under the second specification of Rev. Sts. U.S. sec. 709, for re-examination of the final decree in a suit which draws in question the validity of the Massachusetts statute of 1898, c. 452, and the authority exercised thereunder to make the decree, on the ground of their repugnancy to the requirement of due process of law in the second clause of section 1 of the Fourteenth Amendment of the Federal constitution.

The objection that the statute is in conflict with this

clause of the Fourteenth Amendment was clearly seasonably and repeatedly presented below (Record, pp. 7, 11, 16, 19, 24, 25, 26); though this may have been unnecessary in this case. It is immaterial that the court did not specifically discuss or expressly overrule the Federal objections in its judgment or opinion. The decree could not have been made without overruling them.

> *Chicago &c. R.R. Co.* v. *Chicago*, 166 U.S. 226, 231.
> *Yazoo & Miss. Railway Co.* v. *Adams*, 180 U.S. 1, 14, and cases cited.

As the statute is the only foundation for the decree, it is evident that the state court held it sufficient, notwithstanding the Federal objections, to warrant a decree for the cutting down of the building at the time and under the circumstances disclosed, namely, in advance of a conclusive determination of the validity of the provision for damages, or of the taking. This conclusion necessarily involves the rulings specified in the assignments of error numbered 2 to 6, inclusive, all of which are essential to the making of the decree.

And as the decree necessarily involves determination that the statute, in its application to the plaintiffs in error, is not in any particular in contravention of the due process clause of the Fourteenth Amendment, and that the court, by virtue of the statute, [illegible] properly proceed to cut down the building while the validity of the taking and of the provision for damages remain undetermined, the Federal objections taken below to the statute, equally apply to and affect the decree. The decree necessarily negatives all the Federal objections, and is itself the final and conclusive ruling and determination of the state court that neither of them is to be sustained.

The statement of agreed facts is properly before the court, as part of the record. It was made part of the record of the state court by the terms of the reservation. (Record, p. 50, as amended.)

Old Colony Railroad Co. v. *Wilder*, 137 Mass. 536, 537.
England v. *Gebhardt*, 112 U.S. 502, 505, and cases cited.

This court is not asked to review any question of fact. The only facts to which the plaintiffs in error call special attention, as part of the history of the case, showing the situation of the parties and the circumstances under which the decree below was made, are that the city of Boston is actually resisting the proceeding for damages, on constitutional grounds, denying its liability to damages and refusing to pay; that this proceeding is still undetermined and awaiting trial; that the city is without funds to meet such liability, has no specific power to raise or appropriate moneys for such a purpose, and has only a limited power to incur any indebtedness; as set out in the record, pp. 44, 45.

All the assignments of error relied on involve but the single question of the repugnancy of the statute and the decree to the due process clause of the Fourteenth Amendment, and may be dealt with together.

The Main Question.

The case presents a narrow but important question, affecting the rights of every person whose property is taken by eminent domain under state authority.

By a direct legislative act of eminent domain the state takes for the public, for improvement of the light, air, and view of a public square or park, certain rights in an estate contiguous thereto, in the nature of

an easement limiting the height of buildings thereon. To the validity of this statute due provision for just compensation is essential. It provides compensation only by giving the owners a right of action for damages against the city in which the estate lies. Immediately upon completion of the building thereon, a proceeding in the name of the attorney general is brought against the owners to restrain them from maintaining a part of it which is alleged to exceed the limited height. While the city, which was not party to the taking and therefore is not estopped to dispute its validity, and which is not party to this proceeding and therefore is not bound thereby, in the exercise of its legal rights is disputing the validity of the provision for compensation, on which the validity of the taking depends, and denying its own liability to damages and refusing to pay damages unless and until it is held liable therefor in another proceeding yet undetermined, the court makes a decree against the owners requiring the cutting down and removal of that part of the building which is adjudged to exceed the limited height.

Shortly stated, the question which arises is substantially this: Is it consistent with the Federal requirement of due process of law, in the Fourteenth Amendment, for a state court to enforce, by dispossession and destruction of property, a statute of eminent domain, to the validity of which due provision for just compensation is essential, while the questions whether the statute contains any valid and enforceable provision for compensation or damages, and the resulting question whether there has been any valid taking of any rights in the property, are uncertain and are actually disputed in litigation and undetermined?

The Massachusetts court holds the statute of 1898

to be an exercise of the power of eminent domain, taking property rights in the nature of an easement in the estate of the plaintiffs in error. (Record, pp. 55, 57, 58, 60.) As the statute purports to provide compensation, and as it has no relation to the public health, morals, or safety, this is practically a necessary construction.

> *Talbot* v. *Hudson*, 16 Gray, 417, 420.
> *Dorgan* v. *Boston*, 12 Allen, 223, 230.
> *Parker* v. *Commonwealth*, 178 Mass. 199, 204.
> *Sweet* v. *Rechel*, 159 U.S. 380, 396, *et seq.*

This construction will be accepted by this court and the statute dealt with accordingly.

> *W. W. Cargill Co.* v. *Minnesota*, 180 U.S. 452, 466, and cases cited.

The general principles applicable to the case are so familiar as hardly to call for citation of authority.

1. It is elementary that due provision for just compensation for private property taken for public uses is essential to the validity of an act of eminent domain. Without it, such an act is a nullity, incapable of warranting any interference with the property sought to be taken.

This is settled in Massachusetts, as it is universally, under the constitutional requirements, that "no subject shall be despoiled or deprived of his property . . . but by the judgment of his peers or the law of the land" (Declaration of Rights, art. XII); and that "No part of the property of any individual can *with justice* be taken from him or applied to public uses without his own consent or that of the represen-

tative body of the people. . . . And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive reasonable compensation therefor." (Declaration of Rights, art. X.)

Perry v. *Wilson*, 7 Mass. 393, 395.
Stevens v. *Props. of Middlesex Canal*, 12 Mass. 466, 468.
Brickett v. *Haverhill Aqueduct Co.*, 142 Mass. 394, 396.
Attorney General v. *Old Colony R.R.*, 160 Mass. 62, 90.
Bent v. *Emery*, 173 Mass. 495, 497, 498.

Without such provision the statute "is unconstitutional and void, and does not justify an entry upon the land of the owner without his consent."

Conn. River R.R. v. *County Comm'rs*, 127 Mass. 50, 52, and cases cited.

2. It is not enough that the statute *purports* to make provision for compensation. The provision must be certain, amounting to assurance of it, without risk of failure in any event. It is beyond legislative power to cast upon the property owner any hazard of loss of his property without compensation.

"The power to take and the obligation to indemnify for the taking are inseparable. They are parts of one transaction."

Drury v. *Midland Railroad*, 127 Mass. 571, 576.

"The duty of *paying* an adequate compensation for private property taken is inseparable

> from the exercise of the right of eminent domain. . . . The means for securing indemnity must be such that the owner will be put to *no risk* or unreasonable delay."

In this case the court doubted whether a right of action against towns would be enough, but held that it was the duty of the public authorities who made the taking to estimate and award the damages.

> *Haverhill Bridge* v. *Essex Comm'rs*, 103 Mass. 120, 124.

"It is not enough to leave the owner to his action at law for damages."

> FIELD, C.J., in *Attorney General* v. *Old Colony R.R.*, 160 Mass. 62, 90.

Where the damages are charged upon a particular fund in the hands of the state, though it is agreed to be adequate in amount, the statute is void for failure of certain provision for compensation.

> *Conn. River R.R.* v. *County Comm'rs*, 127 Mass. 50.
> *Brewster* v. *Rogers Co.*, 169 N.Y. 73, 80.

And where the state takes the property, with provision for ascertainment of damages "in the manner provided for the recovery of damages sustained by reason of the laying out of ways," the statute is unconstitutional, it not being sufficiently certain that the state assumes the damages. An implication, however clear, is not enough.

> *Bent* v. *Emery*, 173 Mass. 495, 497.

This court has held, under the constitution of Indiana, which is not different in substance or effect from that of Massachusetts, that "both on principle and authority the rule is, under such a constitution . . . that *the title does not pass from the owner*, without his consent, until just compensation has been *made* to him."

Kennedy v. *Indianapolis*, 103 U.S. 599, 604.

Where the statute provided for payment into court of double the amount of damages awarded by referees, before entry on the land, and this was challenged as insufficient, this court, declaring that "the owner is entitled to reasonable, *certain* and adequate provision for compensation *before his occupancy is disturbed*," sustained the statute on the ground that it required full compensation to be *made* before constructing the railway through the lands taken, and that "the title does not pass until compensation is actually made to the owner."

Cherokee Nation v. *Kansas Railway Co.*, 135 U.S. 641, 659.

Again, where the validity of the provision for damages was questioned on the ground that no sufficient appropriation for payment was made, this court sustained it on the ground that by the statute neither title nor possession passed until payment of damages.

Bauman v. *Ross*, 167 U.S. 548, 598.

And in the case of a direct taking by the United States, this court declared that the fact, had it appeared, that the appropriation for the payment of damages was exhausted before the beginning of pro-

ceedings to take the land, "would give rise to a very serious question."

United States v. *Gettysburg Railway*, 160 U.S. 668, 684.

In *Sweet* v. *Rechel*, 159 U.S. 404, 407, which is materially different from the present case, this court went no farther than to hold that under the Massachusetts constitution, if the statute expressly provides that the title shall pass in advance of payment, it does pass if the provision for compensation is such "that the owner *can certainly obtain* the amount of such compensation;" and the title was held to have passed, on the ground that "the provision made for compensating the owner was *certain* and adequate." There the city made the taking, and was thereby estopped to deny its validity or its own liability to damages, which was undisputed and indisputable.

3. Due provision securing just compensation to the owner of property taken in the exercise of the power of eminent domain by or under the states is required by the due process clause of the Fourteenth Amendment.

Monongahela Navigation Co. v. *United States*, 148 U.S. 312, 324, *et seq.*
Chicago, Burlington &c. Rd. v. *Chicago*, 166 U.S. 226, 235, 241.
Long Island Water Co. v. *Brooklyn*, 166 U.S. 685, 695.
Smyth v. *Ames*, 169 U.S. 466, 526.
Backus v. *Fort St. Depot Co.*, 169 U.S. 557, 565.
Norwood v. *Baker*, 172 U.S. 269, 277.

4. The Federal requirement of due process of law extends to judicial as well as to legislative action of

the states. The decree of a court may invade the requirement, no less than a statute.

> "A judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth amendment of the constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."
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> *Chicago, B. & Q. Rd.* v. *Chicago*, 166 U.S. 226, 241.

See also —

Virginia v. *Rives*, 100 U.S. 313, 318.
Ex parte Virginia, 100 U.S. 339, 346.
Civil Rights Cases, 109 U.S. 3, 11.
Logan v. *United States*, 144 U.S. 263, 290.
Scott v. *McNeal*, 154 U.S. 34, 45.
Gibson v. *Mississippi*, 162 U.S. 565, 581.
Williams v. *Mississippi*, 170 U.S. 213, 220.
Blake v. *McClung*, 172 U.S. 239, 260.

In the present case, if it is not consistent with due process of law for the court to order the actual destruction of the property while the question whether there is any valid taking or provision for compensation remains in dispute and undetermined, the decree should be reversed, notwithstanding the possibility that in the other proceeding for damages against the city the statute may eventually be held

constitutional and the provision for compensation valid. If assurance of just compensation is, as held by this court, a condition precedent to the exercise of eminent domain, without which the title does not pass in advance of payment, *à fortiori* is it a condition precedent to actual dispossession and destruction of the property.

The case is peculiar, as the statute out of which it arises is unprecedented. Ordinarily, in the direct taking of property by the state, the state expressly assumes the damages. If the power to take is delegated, the agency authorized to make the taking is expressly made liable. In either case, the act of taking estops the taker to deny its validity or its own liability to make compensation.

Gloucester Water Co. v. *Gloucester*, 179 Mass. 365, 377, 378, and cases cited.
See also *Daniels* v. *Tierney*, 102 U.S. 415, 421.
Electric Co. v. *Dow*, 166 U.S. 489.

Accordingly, in the ordinary case the question now presented could not arise.

Here, however, the taking is the direct act of the state, while the sole liability for damages is cast upon the city. The city, having no part in the taking, is at liberty to dispute, and does dispute, its liability for damages. This question is not and cannot be determined as against the city in this proceeding, as the city is not party to it. The defendants below repeatedly attempted to have the city joined or the prosecution stayed until the question of damages could be determined, but the court refused. (Record, pp. 14, 16, 17.)

The statute of 1898 provides for no bond, deposit, or other security for damages. There is nothing for

the property owner but a mere right of action against the city. "The manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city" of Boston, is according to the subjoined statutes:

St. 1888, c. 397, sec. 1:

SECTION 1. Sections eighty-four, eighty-five, and eighty-six of chapter forty-nine of the Public Statutes are hereby amended so as to read as follows: "*Section 84.* The board of street commissioners of the city of Boston shall have power to lay out, locate anew, alter, widen, and discontinue highways in the city of Boston and order specific repairs thereon, and whenever they are of the opinion that the public necessity and convenience require that a highway shall be laid out within said city, or that an existing highway shall be located anew, altered, widened, or discontinued, or that specific repairs shall be ordered thereon, the said commissioners shall appoint a time for a public hearing, and shall cause a notice thereof and of their intention in the matter to be published once a week for two successive weeks in two daily newspapers published in said city, the last publication to be at least seven days previous to the time fixed for said hearing. Said hearing may be adjourned from time to time, if the commissioners deem it necessary, and, after said hearing, said commissioners shall determine what action relating to said way the public necessity and convenience require; and such determination, being recorded in the records of said commissioners, the said way shall be thereby laid out, located, altered, widened, or discontinued, or specific repairs shall be ordered, in accordance with such determination. *Section 85.* Said commissioners shall estimate the amount of damage sustained by any persons in their property by such laying out, locating anew, altering, widening, or discontinuing, or ordering specific repairs on, a highway, and, in their aforesaid determination, shall state the share of each separately. *Section 86.* The city, or any party interested, if dissatisfied with the estimate of damage in

any case mentioned in the preceding section, may have the amount of such damages determined by a jury at the bar of the superior court, in the same manner in which other civil causes are there tried, by filing in the clerk's office of said court, for the county of Suffolk, at any time before the expiration of one year from the time when the lands are entered upon, and possession taken for the purpose of constructing the highway, or when no land is taken, from the time when the work is actually commenced on the highway, a petition for such jury. The petitioner before filing his petition shall notify the adverse party to appear and answer thereto, by causing a summons containing a copy of said petition to be served upon him in the manner provided by sections twenty-nine to thirty-six inclusive of chapter one hundred and sixty-one of the Public Statutes."

St. 1892, c. 415, sec. 3:

SECTION 3. Section eighty-six of said chapter as amended by chapter three hundred and ninety-seven of the acts of the year eighteen hundred and eighty-eight is hereby amended so as to read as follows:— *Section 86.* The damages sustained in any case specified in the preceding section shall be paid by the city of Boston, and said city, or any party interested, if they cannot agree upon the amount of such damages may, within the time specified for a like purpose in section thirty-three, file a petition for a jury in the office of the clerk of the superior court for the county of Suffolk, and thereupon, after such notice as the court shall order, a trial shall be had in the said court, in the same manner as other civil cases are there tried by jury, and if either party request, the jury shall view the place in question.

If the taking is not for a proper public purpose, as the city asserts, or if it is beyond the power of the legislature to take property for such a purpose at the expense of the city, or if the provision for compensation is insufficient, or if for any other reason the taking is invalid, — all which questions are open to the

city in the proceeding for damages, — the public has acquired no rights in the estate of the plaintiffs in error, and the court has no power to lay hands upon it.

While the city is litigating these questions, as it has an indisputable right to do, and while it is yet undetermined and necessarily uncertain whether the provision for damages is valid and enforceable, in default of which the public has acquired no rights in the property and the entire statute is a nullity, the court cuts down the building; leaving the owners to establish the liability of the city to damages if they can, and casting upon them the loss of their property without compensation if they cannot.

The plaintiffs in error are compelled, at one and the same time, to try with the state the validity and extent of the taking, in which the city had no part and for which it denies and has a right to deny its liability to make compensation, in a suit to which the city is not a party, and in which these questions are not and cannot be determined as against the city; and to try with the city the validity of the provision for compensation, upon which the validity of the taking depends, in a suit in which the state, which made the taking, is not a party and has no interest. And as the validity of the taking depends upon the validity of the provision for compensation, which can be determined only in the proceeding for damages against the city, the decree in the present case enforces, by actual destruction of property, alleged public rights the existence of which is yet uncertain and is legally disputed, and which, in the only case that can finally determine the question, may be held to have no existence.

The state court, which made the decree, cannot finally determine these questions in any proceeding. The city may bring them to this court for final determination. The state court, in the proceeding

against the city for damages, cannot hold itself bound by the judgment in this case. This would be, in effect, to hold the city bound, as clearly it cannot be. It is open to the city, in the proceeding for damages, to assail the statute on grounds not open to the plaintiffs in error in this case. In that case, the court must be governed by other considerations, and may find itself constrained to hold that the city is not liable. Or if it holds the city liable, this court may hold it not liable. In the meantime the building has been cut down; the plaintiffs in error have lost their property under an act which turns out a nullity from the beginning, and are left without remedy for compensation or damages.

The state itself cannot be compelled to make compensation. While a statute provides that "The Superior Court for the County of Suffolk shall have jurisdiction of all claims at law or in equity against the Commonwealth" (Mass. Rev. Laws, c. 201, sec. 1), the plaintiffs in error have no enforceable claim against the state if the statute is eventually held unconstitutional as against the city. The state has never undertaken this liability for damages; and it cannot be held liable for the acts of its public officers, whether merely tortious or in course of judicial procedure, under a void statute.

See *Conn. River Rd.* v. *County Comm'rs*, 127 Mass. 50, 56.
Murdock Grate Co. v. *Commonwealth*, 152 Mass. 28.
Bent v. *Emery*, 173 Mass. 495, 498.

In fine, in event of the provision for damages being held non-enforceable as against the city, which is possible in law and not wholly improbable in fact, the plaintiffs in error are arbitrarily despoiled of their property. They are at this moment, and until

this decree is reversed, exposed to spoliation. It is not due process of law that places them in this situation.

It is not to the purpose to say that this event is unlikely. It is legally possible, and actually uncertain. It is beyond legislative power to cast such a risk upon the owner of property taken by eminent domain. He has a fundamental right to compensation, and the right to be secure in it. Doubts must be resolved in favor of the right. The provision for damages cannot be presumed valid or enforceable unless it clearly appears, upon its face, to be so. The existence, at the time of passage of a statute, of facts essential to its validity may be presumed; but no presumption as to the determination of a future event, so uncertain as the result of contested litigation, can satisfy this imperative constitutional requirement. Authorities *supra*, especially —

Haverhill Bridge Props. v. *County Comm'rs*, 103 Mass. 120, 124, 125.
Conn. River R.R. v. *County Comm'rs*, 127 Mass. 50.
Bent v. *Emery*, 173 Mass. 495, 497.

While the question of the validity of the provision for compensation, or the resulting question of the validity of the taking, cannot be determined as against the city of Boston in this proceeding, it may readily be shown that the validity of each is so far doubtful that the statute cannot be said, upon its face, to make due provision for just compensation with the certainty required by due process of law in the exercise of eminent domain, or to warrant a decree for destruction of the property while this remains undetermined.

The established doctrine that cities are primarily political agencies of the state, and subject to its con-

trol in respect of their public powers and public property held for governmental purposes, does not reach the present question, of the degree of security for compensation required by due process of law in the exercise of eminent domain; and by no means settles the other question, of the ultimate liability of the city under this statute.

The decree goes on the ground that the statute is for the improvement of Copley square regarded as a public park, for which purpose the legislature may properly require the city to pay damages for property taken by act of the state. (Opinion of the court, Record, pp. 55–57.)

Unless the legislature has power to compel a city to establish public parks, it has no power to compel a city to take or pay for property for improving them when established. In the states in which the direct question whether the legislature may compel a city or town to establish public parks has been judicially raised, under constitutional provisions substantially like those of Massachusetts, it has uniformly been determined in the negative.

People v. *Hurlbut*, 24 Mich. 44, 93.
People v. *Detroit*, 28 Mich. 228, 233 *et seq.*
Park Comm'rs v. *Mayor*, 29 Mich. 343.
Thompson v. *Moran*, 44 Mich. 602.
Webb v. *Mayor of New York*, 64 How. Pr. 10.
Dillon, Munic. Corp. (4th ed.) secs. 71–74*a*.

See also *Atkins* v. *Randolph*, 31 Vt. 226.
State ex rel. McCurdy v. *Tappan*, 29 Wis. 664, 680, 687.
Louisville v. *University*, 15 B. Mon. 642.
State v. *Fox*, 63 N.E. Rep. 19, 21 (Indiana).

Until the present case, the Massachusetts court had never gone so far as to hold that the legislature may *compel* a city to tax its inhabitants for a system of public parks, nor is there believed to be authority for this proposition in any state. It had gone no farther than to hold that the legislature may *authorize* taxation for this purpose.

> *Holt* v. *Somerville*, 127 Mass. 408, 413.
> *Foster* v. *Park Commissioners*, 133 Mass. 321, 326.

And that court seems to regard parks, when established by a city under legislative authority, as held by it in a quasi-private and proprietary character, beyond legislative power to take away.

> *Props. of Mt. Hope Cemetery* v. *Boston*, 158 Mass. 509, 519.

If the legislature cannot divest a city of property held by it in a proprietary character, it must be because the city, in that character, is not within legislative control as it is in its public or political character. If legislative control does not extend to such property, the legislature has no more power to compel a city to acquire it, or to take it for a city against its will and at its expense, than to take it away when acquired.

The city, in resisting the proceeding for damages, has the advantage of defending against a novel if not unprecedented statute, exercising, for a doubtful purpose, a power hitherto unheard of in Massachusetts if not elsewhere, the existence of which is denied by the only judicial authorities in point on the question. The privilege of prevailing against this defence if they can is the "due provision for just compensation" offered the plaintiffs in error by this statute, as satisfying the requirements of due process of law.

The city of Boston never had any moneys appropriated, nor any specific power to appropriate moneys, to meet the liability cast upon it by the statute of 1898; and its power to raise and appropriate money for any purpose is limited by statute. (Agreed Facts, Record, pp. 44, 45.)

At the time of the passage of the statute of 1898 the city was limited, in general taxation, to an assessment of $9 on each $1000 net valuation, and was forbidden to incur indebtedness to an amount exceeding 2 per cent of its valuation. At and since the time of the making of the decree, the limit of taxation was $10.50 per $1000, and the limit of indebtedness 3 per cent of the valuation.

The statutes material to this point are as follows: —

Public Statutes, c. 29:

SECTION 1. Cities and towns shall not incur debts except in the manner of voting, and within the limitations as to amount and time of payment, prescribed in this chapter.

SEC. 4. No city or town, except as provided in the following section, shall become indebted in an amount which exceeds three per cent on the last preceding valuation, for the assessment of taxes, of the taxable property therein.

St. 1885, c. 178 (as amended by St. 1887, c. 281, sec. 1), superseding, for Boston, the foregoing provisions:

SECTION 1. The taxes assessed on property in the city of Boston, exclusive of the state tax and county tax not exceeding four hundred and twenty-five thousand dollars and of the sums required by law to be raised on account of the city debt, shall not exceed in any year nine dollars on every one thousand dollars of the average of the assessors' valuations of the taxable property therein for the preceding five years, the valuation for each year being first reduced by the amount of all abatements allowed

thereon previous to the thirty-first day of December in the year preceding said assessment. Any order or appropriation requiring a larger assessment than herein first above limited shall be void.

SECTION 2. The limit of indebtedness of the city of Boston shall hereafter be two and one-half per cent. up to and until the first day of January in the year eighteen hundred and eighty-seven, and thereafter shall be two per cent. on the average valuation prescribed in section one of this act, instead of three per cent. on the last preceding valuation as provided in section four of chapter twenty-nine of the Public Statutes.

St. 1900, c. 399 (superseding St. 1885, c. 178):

SECTION 1. The taxes assessed on property, exclusive of the state tax, county tax and sums required by law to be raised on account of the city debt, shall not exceed in any year in the city of Boston ten and one-half dollars, and in any other city twelve dollars, on every one thousand dollars of the average of the assessors' valuations of the taxable property therein for the preceding three years, the valuation for each year being first reduced by the amount of all abatements allowed thereon previous to the thirty-first day of December in the year preceding said assessment; and any order or appropriation requiring a larger assessment than is herein limited shall be void.

SECTION 2. Chapter one hundred and seventy-eight of the acts of the year eighteen hundred and eighty-five and chapter two hundred and eighty-one of the acts of the year eighteen hundred and eighty-seven are hereby repealed.

It was formerly understood in Massachusetts that the property of the inhabitants is liable to seizure on execution for a debt of a city or town.

Conn. River R.R. v. *County Comm'rs*, 127 Mass. 50, 54, and cases cited.

Apparently this can no longer be regarded as the law.

Rees v. *Watertown*, 19 Wall. 107, 122.
Merriwether v. *Garrett*, 102 U.S. 472, 501, 519, 526.

Without the aid of these statutes or the agreed facts that the city is actually contesting the validity of the statute of 1898, and is without funds to meet this liability if enforceable, there is enough on the face of the statute to impeach its validity. A statute of eminent domain by which the state takes property and makes provision for compensation only by giving a right of action for damages against a third party, which third party had no part in the taking and is therefore legally at liberty to deny its validity and its own liability to damages, is insufficient, on its face, to support a decree for the destruction of the property unless and until it affirmatively appears at least that the validity of the taking and of the provision for compensation or damages is conclusively determined as against the party made liable. Such a statute cannot be held to provide compensation with substantial certainty, which is essential to due process of law. A statute which, upon its face, may not yield compensation is as defective as one which cannot.

It is plain, upon the face of the statute, that the alleged taking is the direct act of the state, in which the city had no part, and therefore that it is legally open to the city to dispute its validity and its own liability to damages, and legally possible that it may prevail in that dispute. If the provision for damages is invalid, the statute, so far as it applies to the plaintiffs in error, is a nullity, incapable of enforcement. If the taking is not for a proper public use, or is for any other reason invalid, the public has acquired no rights in the property, and the court has no power to molest it.

It is inconsistent with the inherent substance of due process of law, as universally understood and applied,

to enforce such a statute against the owner of the property, by actual dispossession and demolition, at least until the validity of the provision for damages, upon which the validity of the taking depends, is established as against the party made liable. The statute, construed to authorize such enforcement, is in conflict with the due process clause of the Fourteenth Amendment. If the statute does not authorize it, the decree is itself an invasion of the Federal right.

While it is not essential to the reversal of this decree, the plaintiffs in error contend, and but for the long practice to the contrary they would contend with great confidence, that a statute taking private property by eminent domain and providing for no award of damages to the property owner, but leaving him to a remedy at the expense of proceedings at law, does not fulfil the constitutional requirement of due provision for just compensation which is essential to due process of law. This is the ground of the fifth assignment of error. (Record, p. 53.)

No award of damages, except on trial in court, is made in such a case as this, by the street commissioners or any other tribunal. The statutes of 1888 and 1892, *supra*, are deemed to require them to make an award only when they themselves make the taking.

See *Rand* v. *Boston*, 164 Mass. 354, 356.
Danforth v. *Groton Water Co.*, 176 Mass. 118, and cases cited.

The purpose of the constitutional guaranty is to secure fair but full indemnity. To answer this purpose the provision for compensation must be such as to secure to the owner an equivalent in money for the property with which he is compelled to part. It should leave him as well off as it found him.

This is not effected by giving him merely a right to sue for his damages. The expenses of litigation make an inroad upon the damages recoverable. In a case of small amount they may, and sometimes do, absorb the whole, leaving the owner without any actual compensation.

The principle that expenses of litigation are a necessary incident of the legal enforcement of ordinary claims cannot properly be applied to the taking of property by eminent domain. The constitutional safeguards require that the owner be made whole. The requirement can be met only by providing for some award or assessment of damages to be made, as of course, without the necessity of suit; which the owner can take without diminution, as an alternative to the expensive process of appealing to the courts. Merely to give him a right of action is to comply with the requirement in form, while violating it in substance.

This finds some support in the court which made this decree.

See *Haverhill Bridge* v. *Essex Comm'rs*, 103 Mass. 120, 125.
Attorney General v. *Old Colony R.R. Co.*, 160 Mass. 62, 90.

Another consideration illustrates the inequity of the present decree.

In the ordinary case the owner of property taken by eminent domain has not only the security of the statutory provision for compensation, but if for any reason that provision fails, equity will exclude the taker and restore the orginal owner to possession; so solicitous is the law for his protection.

Attorney General v. *Old Colony R.R.*, 160 Mass. 62, 90, and cases cited.

Rockport Water Co. v. *Rockport*, 161 Mass. 279, 280, and cases cited. Cases collated, 159 U.S. 389.

Here, while the city, which alone is made liable for damages, is refusing to pay, and contesting any obligation to pay, as it has a right to do, the state court proceeds to destroy the property, putting it beyond reach of restoration; and this notwithstanding it is beyond the power of that court to finally determine the liability of the city, which power belongs to this court alone.

The decree cannot be justified under the police power to deal with nuisances or purprestures, though the state court seems to regard this as the latter. (Record, p. 59.) There is no nuisance, in any view of the statute, and no purpresture unless the public has lawfully acquired a complete title to the easement claimed. Moreover, the information and the decree stand solely upon the statute of 1898. This statute being held by the state court to be an exercise of the power of eminent domain, which construction will be accepted by this court, especially as it appears to be the necessary construction, the statute must be dealt with as an act of eminent domain, and the decree as an attempt to enforce an act of eminent domain; subject to all the constitutional restraints which affect the exercise of that power.

It may be suggested that the plaintiffs in error have delayed to press their petition for damages against the city. This, if so, does not affect the constitutionality of the statute; but it is not so. While the record shows that at the time when the agreed facts

were filed, December 30, 1900, the petition had not been "marked for trial" (Record, p. 44), it does not show that it could have been marked for trial earlier, or reached for trial if marked; and therefore shows no delay. But the conclusive answer is that the petitions for damages could not properly be tried until it was determined how far the building must be cut down or altered to conform to the judicial view of the statute; as, until that was determined, the extent of the damage, especially under section 3 of the statute, and the amount recoverable, if anything is recoverable, could not be known or ascertained. This was undetermined until the final decree in this case, March 13, 1901. That decree must be dealt with according to the facts as they existed when it was made. Down to that time it is clear that the petitions for damages could not properly have been tried. And as the decree is brought in question by this writ of error, it is not to be expected that the petitions will be tried until the writ of error is disposed of.

The reversal of the decree will not interfere with trial of the petitions for damages. The power of the state court to make such a decree, if and when the provision for damages is conclusively held valid and enforceable as against the city, is not now in question; and its opinion has defined the extent of the damage.

The only course by which this statute, assuming all parts of it to be valid, can be worked out consistently with the right of the plaintiffs in error to just compensation as essential to due process of law, is to determine to what extent the building must be cut down or altered to conform to its view of the statute, — which the court has now done by its final opinion and decree, — and thereupon, the extent of the dam-

ages being thus ascertained, to allow the owners proper opportunity to try, in the proceeding against the city of Boston, the validity of the provision for damages, on which the validity of the taking depends, before entry or execution of this or any similar decree.

Summary.

The only question is whether this decree for the cutting down of the building, at the time and under the circumstances disclosed, is to be sustained. This depends upon the question whether the statute makes due provision for just compensation, as essential to due process of law in the exercise of eminent domain, with such certainty as to warrant the decree.

All authorities agree that due provision for just compensation is essential to the validity of an act of eminent domain, without which the act is a nullity. The rule of this court, of the Massachusetts court, and of most others, is that the provision must be substantially certain.

Substantial certainty of compensation cannot be predicated of a statute which leaves the right to depend upon the event of litigation with a third party which disputes, has a right to dispute, and has reasonable grounds for disputing, its liability. The alternative to certainty is uncertainty; and this means that the provision *may* fail; which is fatal to the statute. If the provision for compensation is insufficient, the attempted taking is void, the public has acquired no rights in the estate, and the court has no power to molest it.

Under constitutions substantially the same in this particular as that of Massachusetts, this court has held that the title to property taken by eminent domain does not pass from the owner in advance of payment of compensation. The court is at liberty to

apply this rule, in the present case, in determining what degree of security for compensation is essential to the Federal requirement of due process of law. It may reasonably be held that this forbids the passing of the title, so as to warrant occupation, or destruction of the property, until it is paid for. If title to the easement sought to be taken here has not vested in the public, it follows that this decree for the cutting down of the building at this stage, is a deprivation of property without due process of law.

Sweet v. *Rechel*, *supra*, in which this court held that it is within the power of the legislature of Massachusetts to divest, by express words, the title of the owner of property taken by eminent domain in advance of payment, is materially different from the present case in several particulars. (1) There the court was construing the constitution of Massachusetts, in the light of the Massachusetts decisions, which were of persuasive authority; *Burgess* v. *Seligman*, 107 U.S. 20, 33. Here the court is construing the due process clause of the Federal constitution, according to its own views of what is essential to due process of law, on principles of general jurisprudence. (2) There the question did not arise between the taker of the property and the owner seeking compensation, but between third parties, on a collateral question, long after the property had been taken and the record owner paid for it. (3) There the statute expressly provided that title should vest in the city upon the taking, which was the real ground of decision. This statute contains no such provision. (4) There the city made the taking, and was thereby estopped to deny its validity or its own liability to damages. Here the city had no part in the taking, and disputes, and is at liberty to dispute, both. (5) There the court held the provision for compensation to be certain; there being no element

of uncertainty in it except the credit of the city. Here the *liability* of the city is disputed and is uncertain. The case lends no support to this decree.

The decree cannot be sustained consistently with the fundamental conception of due process of law in the exercise of eminent domain, or with the views hitherto expressed by this court.

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